Supreme Court, U.S.
FILED

961653 APR 17 1997

No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

JOE OMORODION OSAREN,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTIONS PRESENTED

In immigration proceedings involving individuals with no criminal record, the Board of Immigration Appeals, even where it denies all other relief, will in nearly all cases grant a brief period during which such persons may depart the country voluntarily, thereby allowing them to avoid deportation and resultant bars to reentry.

These individuals have the right to seek judicial review in the U.S. Circuit Courts of Appeals of the Board's decisions generally. Some courts have held, however, that they cannot or will not reinstate the Board's voluntary departure grant if the appeal from the Board's decision is dismissed, and that such remedy can only be sought from the Immigration and Naturalization Service. Persons seeking judicial review in such jurisdictions therefore face the possibility of losing the minimal relief of voluntary departure granted by the Board, merely because they choose to exercise their appeal rights as to other relief that was denied.

The questions presented are:

1) Whether the U.S. Circuit Courts of Appeals can or should reinstate or otherwise preserve a grant of voluntary departure by the Board of Immigration Appeals?

2) Whether in the present case the U.S. Circuit Court of Appeals for the Fifth Circuit erred in declining to review the refusal by the Board of Immigration Appeals to extend its voluntary departure grant to cover the judicial review period?

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

MAY IT PLEASE THE COURT:

Petitioner, Joe Omorodion Osaren, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgments of the United States Court of Appeals for the Fifth Circuit entered in this matter on December 24, 1996.

OPINIONS AND JUDGMENTS BELOW

The opinion and judgment of the three-judge panel of the United States Court of Appeals for the Fifth Circuit, entered on December 24, 1996, are reprinted in the Appendix to this Petition at pages App. 1 through App. 2. The order of the United States Court of Appeals for the Fifth Circuit entered on February 25, 1997, denying a petition for rehearing, is reprinted in the Appendix to this Petition at pages App. 3 through App. 4. The order of the United States Court of Appeals for the Fifth Circuit entered on March 18, 1997, staying the issuance of its mandate, is reprinted in the Appendix at page App. 5. The decision and order of the Board of Immigration Appeals, filed February 21, 1996, are reprinted in the Appendix at pages App. 6 through App. 12. The decision and order of the Immigration Judge, filed June 8, 1995, are reprinted in the Appendix at pages App. 13 through App. 22.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit denying rehearing was entered on February 25, 1997, and the judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 24, 1996, affirming the Board of Immigration Appeals' decision dated February 21, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1254(1) and SUP. CT. R. 20.1.

STATUTES INVOLVED

This case involves the following provision of the United States Code:

former 8 U.S.C. Sect. 1254(e)(1)

> Except as provided in paragraph (2), the Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), (18), or (19) of section 241(a) (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (2) of subsection (a) of this section) to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

STATEMENT OF THE CASE

I. Basis for Federal Jurisdiction in the Court of First Instance

Joe Omorodion Osaren herein seeks review of the decision by the Court of Appeals for the Fifth Circuit on his Petition for Review taken from the administrative decision by the Board of Immigration Appeals ("BIA") in deportation proceedings. The Fifth Circuit's jurisdiction was invoked under former 8 U.S.C. Sect. 1105a(a), which established the exclusive procedure for judicial review of such administrative decisions.

II. Statement of Facts

Mr. Osaren, a native and citizen of Nigeria, entered the U.S. in legal nonimmigrant status on January 9, 1983, and has resided in this country continuously since then. Certified Administrative Record ("A.R."), as filed with the U.S. Court of Appeals for the Fifth Circuit in Case No. 96-60179, at 59, 152. Prior to coming to the U.S., Mr. Osaren had married a Nigerian woman, Grace Osaren, in Nigeria. A.R. at 78. Grace later joined him in this country. A.R. at 87. After arriving in the U.S., Mr. Osaren divorced Grace and married a U.S. citizen, Charlotte Ann Cormier. Mr. Osaren has two U.S.-born U.S. citizen children with Grace, and one with Charlotte. A.R. at 54. He has not been convicted of any crimes. A.R. at 55.

III. Proceedings Below

Mr. Osaren was charged with deportability under former 8 U.S.C. Sects. 1251(a)(1)(B) and 1251(a)(1)(C)(i),

for having overstayed his nonimmigrant visa and for having worked without authorization. A.R. at 201. He admitted these allegations and was found deportable. A.R. at 6-8. He then filed a claim for suspension of deportation under former 8 U.S.C. Sect. 1254(a) (based upon the hardship that his family in the U.S. would suffer should he be deported), and in the alternative for voluntary departure under former 8 U.S.C. Sect. 1254(e).

The Immigration Judge held that Mr. Osaren had failed to establish the "extreme hardship" required for suspension of deportation. A.R. at 60-62. The Immigration Judge also denied voluntary departure, alleging that Mr. Osaren's testimony lacked credibility. A.R. at 61.

Mr. Osaren then appealed to the BIA. He asked the BIA to grant suspension of deportation, and in the alternative, should the suspension denial be upheld but the denial of voluntary departure reversed, he asked the BIA to extend voluntary departure to cover the period of judicial review, citing *Faddoul v. INS*, 37 F.3d 185, 192 (5th Cir. 1994). A.R. 33-39.

The BIA disagreed with the Immigration Judge's negative credibility finding, citing "the overall truthfulness and consistency" of Mr. Osaren's testimony. A.R. at 5. It agreed, however, that Mr. Osaren had failed to prove "extreme hardship," and thus upheld the denial of suspension of deportation. A.R. at 3.

Because it had found Mr. Osaren credible, the BIA sustained his appeal as to the voluntary departure denial, and granted him thirty days in which to leave the country. A.R. at 5. It failed, however, to extend voluntary departure to cover the judicial review period; in fact, it

failed even to mention Mr. Osaren's request for this extension.

Upon judicial review, the Fifth Circuit affirmed the suspension denial, and went on to state simply that "Osaren's request that we change his voluntary departure date is DENIED," citing *Faddoul, supra*. A subsequent petition for rehearing was denied without discussion.

REASONS FOR GRANTING THE WRIT

As discussed below, at least nine of the U.S. Circuit Courts of Appeals are squarely in conflict over judicial treatment of administrative voluntary departure grants. Such a dispute has long been recognized as a valid ground for granting the writ of certiorari. *McElroy v. United States*, 455 U.S. 642, 643 (1982); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981); *Marks v. United States*, 430 U.S. 188, 189 (1977). The controversy over voluntary departure is a longstanding and live controversy that will not die away or be resolved by further litigation in the lower Courts, who have taken their positions firmly and after careful consideration, including citation and discussion of conflicting precedents. *Cf. McCray v. New York*, 461 U.S. 961, 963 (1983). The situation cries out for Supreme Court intervention.

What follows is a summary of the conflicting positions taken by the U.S. Circuit Courts of Appeals on the issue at bar.

First Circuit

In *Umanzor-Alvarado v. INS*, 896 F.2d 14, 16 (1st Cir. 1990), the First Circuit held that it did have the power to reinstate a BIA grant of voluntary departure, and that it would do so absent any indication that the appeal was dilatory or meritless, or any allegation by INS of ineligibility for such relief. The *Umanzor-Alvarado* court stated that it saw "nothing in the law that requires us to waste time and resources or that deprives us of the legal power to order the legally appropriate [voluntary departure] remedy – a remedy already granted by the [BIA]." 896 F.2d at 16. The First Circuit has continued to follow this approach. *See, e.g., Ravindran v. INS*, 976 F. 2d 754, 763 (1st Cir. 1992), *and Alvarez-Flores v. INS*, 909 F.2d 1, 8 (1st Cir. 1990).

Second Circuit

Holding that the interested party was not precluded from asking INS for reinstatement of voluntary departure, the Second Circuit declined to grant such relief itself. *Ballenilla-Gonzalez v. INS*, 546 F.2d 515, 521-22 (2nd Cir. 1976), *cert. denied*, 434 U.S. 819 (1977).

Fourth Circuit

The Fourth Circuit held that it can and will reinstate voluntary departure where INS does not indicate its opposition on the grounds of alleged ineligibility therefor, and also where it appears that INS is unreasonably refusing to comply in cases where an individual asks it

rather than the court for such relief. *Ramsay v. INS*, 14 F.3d 206, 213 (4th Cir. 1994).

Fifth Circuit

The Fifth Circuit has stated that while it may not have the power to grant or reinstate voluntary departure upon judicial review, it can review a refusal by the Board to extend voluntary departure to cover the judicial review period. *Faddoul v. INS*, 37 F.3d 185, 192 (5th Cir. 1994). Accordingly, the *Faddoul* Court urged individuals in Mr. Osaren's position to ask the BIA to

> grant a voluntary departure period that would expire within a specified time after the Board's decision, or, if a timely petition for review were to be filed within that time and thereafter were to be ultimately denied or dismissed by the court of appeals, then within a specified period following such denial or dismissal.

37 F.3d at 192. Should the BIA refuse to do so, the court stated that it could review such a refusal. *Id.*

Seventh Circuit

In *Kaczmarczyk v. INS*, 933 F.2d 588, 598 (7th Cir. 1991), the Seventh Circuit held that it could extend voluntary departure to otherwise unsuccessful litigants, but that it would do so only upon a showing that "INS is wielding its discretion to withhold voluntary departure to deter applicants from seeking judicial review of BIA decisions. . . . "

Eighth Circuit

The Eighth Circuit, without discussion, declined to reinstate voluntary departure in a similar case, stating merely that the individual affected "may request this relief from INS." *Alsheweikh v. INS*, 990 F.2d 1025, 1028 (8th Cir. 1993).

Ninth Circuit

In a lengthy and carefully-reasoned en banc decision limited to consideration of the issue now at bar, the Ninth Circuit ruled that a voluntary departure grant is part and parcel of the BIA deportation order being appealed to it, and thus is subject to virtually automatic reinstatement by the court upon dismissal of the appeal. *Contreras-Aragon v. INS*, 852 F.2d 1088, 1096 (9th Cir. 1988).

Tenth Circuit

The Tenth Circuit declined to exercise review over voluntary departure in *Castaneda v. INS*, 23 F.3d 1576, 1578-83, *reh'g denied*, 33 F.3d 44 (10th Cir. 1994), after extensively discussing relevant jurisprudence. While finding that it had no jurisdiction over the issue as a matter of law, it also based its approach in part upon its assumption that review could always be sought in the U.S. District Courts of a refusal by INS to reinstate voluntary departure after an appeal dismissal.

Eleventh Circuit

In *Nkacoang v. INS*, 83 F.3d 353, 357 (11th Cir. 1996) the Eleventh Circuit briefly summarized the holding of its

sister Circuits, and opted to follow the approach taken by the Tenth Circuit in *Castaneda, supra.*

This issue is of great importance to litigants, because one who receives an order of deportation – even where there is no criminal or other grave misdeed involved – is barred from returning to the U.S. for five years under former 8 U.S.C. Sect. 1152(a)(6)(B), or for ten years under current 8 U.S.C. Sect. 1152(a)(9)(A)(ii). Those who depart voluntarily, by contrast, may return as soon as they are able to procure a lawful visa.

ARGUMENT

I. The U.S. Courts Of Appeals Can And Should Reinstate BIA Voluntary Departure Grants.

An individual's right to seek judicial review of a dismissal by the Board of his or her appeal would be impermissibly abrogated should that person be forced to choose between exercising that right and preserving the voluntary departure grant. *Contreras-Aragon, supra,* 852 F.2d at 1094-95. The BIA itself has recognized the injustice of placing persons in such a dilemma, and this is what led it to follow a policy of virtually automatic reinstatement of Immigration Judge grants of voluntary departure. *Id.* at 1095.

Exceptions may be made to reinstatement where the individual in question is no longer eligible (e.g., has committed a crime) or where the appeal is determined to be frivolous. *Umanzor-Alvarado, supra,* at 16. INS is certainly free under existing judicial rules to move to that

effect. Reinstatement of voluntary departure would impose only a minimal burden upon the government, as the period to be granted would likely be of only thirty days. *Contreras-Aragon* at 1096-97. It would actually save the government money, as one condition for voluntary departure under former 8 U.S.C. Sect. 1254(a) is that the individual pay for his or her ticket to leave. And while such person would not be barred from subsequent reentry, he or she would still be subject to visa requirements, inspection upon entry, and to all grounds of inadmissibility.

The approach taken by the Fifth Circuit in *Faddoul, supra*, is a commendable attempt at reconciling the various divergent analyses applied by other courts. It depends too much, however, upon whether the appealing party knows enough to recite to the BIA the talismanic language suggested by the *Faddoul* court. A more even-handed result would obtain if voluntary departure is reinstated as a matter of course, subject, as noted, to opposition upon a showing of ineligibility.

II. The U.S. Circuit Court of Appeals For The Fifth Circuit Erred In The Present Case In Declining To Review The Refusal By The Board Of Immigration Appeals To Extend Its Voluntary Departure Grant To Cover The Judicial Review Period.

As noted above, the Fifth Circuit in *Faddoul* counseled those in proceedings before the BIA to ask for a grant of voluntary departure to cover the period of judicial review, and stated that should the BIA refuse to do so, the court would then have the power to overturn such

a refusal. 37 F.3d at 192. As also noted, Mr. Osaren did just as the Fifth Circuit suggested in the present case, but his request was ignored by the BIA, and the Fifth Circuit did not follow up on the relief promised in *Faddoul*. The Fifth Circuit's citation to *Faddoul*, unaccompanied by any attempt at analysis, is inexplicable under the circumstances.

Whatever the relative merits of the *Faddoul* approach as compared to those taken in other Circuits, the Fifth Circuit should be required to follow its own dictates, and persons such as Mr. Osaren have a right to expect to be rewarded for behaving by the rules set forth by the court. The BIA determined that he deserved the minimal relief of voluntary departure, and INS did not appeal such determination; now, however, he faces deportation, for no reason other than for having exercised his appeal rights. Mr. Osaren's appeal to the Fifth Circuit was neither dilatory nor meritless (nor has INS alleged otherwise), and he should not be penalized for having taken it.

CONCLUSION

For the reasons set forth hereinabove, a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

THOMAS P. ADAMS
631 St. Charles Avenue
New Orleans, LA 70130
Telephone (504) 523-3815

Attorney of Record for Petitioner
Joe Omorodion Osaren

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60179
Summary Calendar

JOE OSAREN,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals
(A29 398 450)

(Filed Dec. 24, 1996)

Before KING, HIGGINBOTHAM, and STEWART, Circuit Judges.

PER CURIAM:*

Joe Omorodion Osaren petitions this court to review the decision of the Board of Immigration Appeals (BIA) dismissing an appeal of the Immigration Judge's decision

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

denying an application for asylum and withholding of deportation. There is no error relative to his argument that the BIA improperly required a direct tie between the political conditions in Nigeria and his individual situation. Osaren received a fair and full opportunity to develop his claim of "extreme hardship" before the Attorney General's delegate. *Ramos v. INS*, 695 F.2d 181, 185-86 (5th Cir. 1983); *Hernandez-Cordero*, 819 F.2d at 562. Osaren's request that we order the BIA to change his voluntary departure date is DENIED. *See Faddoul v. INS*, 37 F.3d 185 (5th Cir. 1994).

The petition is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60179

JOE OSAREN

Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent

Petition for Review of an Order of the
U.S. Immigration & Naturalization Serv.

(Filed Feb. 25, 1997)

ON PETITION FOR REHEARING

Before KING, HIGGINBOTHAM and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
Carolyn Dineen King
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III **TEL. 504-589-6514**
CLERK **600 CAMP STREET**
NEW ORLEANS, LA 70130

March 18, 1997

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 96-60179 Osaren v. INS
USDC No. A 29 398 450

The following action has been taken in the appeal referenced above.

The unopposed motion to stay the mandate is granted to and including April 17, 1997.

Sincerely,

CHARLES R. FULBRUGE III,
Clerk

By: /s/ Monica Washington
Monica Washington,
Deputy Clerk

Mr Thomas Perrill Adams
Mr Donald Anthony Couvillon

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board
of Immigration Appeals

File: A29 398 450 – New Orleans Date:

In re: JOE OMORODION OSAREN FEB 21 1996

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Thomas P. Adams, Esquire
631 Saint Charles Avenue
New Orleans, Louisiana 70130

ON BEHALF OF SERVICE:
John D. Carte
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] – In the United States in violation of law

Sec. 241(a)(1)(C)(i), I&N Act [8 U.S.C. § 1251(a)(1)(C)(i)] – Failed to comply with conditions of nonimmigrant status

APPLICATION: Suspension of deportation; voluntary departure

On June 8, 1995, an Immigration Judge found the respondent deportable as charged, denied his applications for suspension of deportation and voluntary departure under sections 244(a) and (e) of the Immigration and Nationality Act, 8 U.S.C. §§ 1254(a) and (e), and ordered

him deported from the United States to Nigeria. The respondent has timely appealed the Immigration Judge's decision as to both forms of relief. The appeal will be sustained in part and dismissed in part.

The respondent is a 41-year-old native and citizen of Nigeria. On March 22, 1994, the Immigration and Nationality Service served the respondent with an Order to Show Cause, charging him with deportability pursuant to sections 241(a)(1)(B) and 241(a)(1)(C)(i) of the Act, 8 U.S.C. §§ 1251(a)(1)(B) and 1251(a)(1)(C)(i). The respondent conceded deportability, but presented evidence in support of his applications for suspension of deportation and voluntary departure.

At the conclusion of the deportation hearing, the Immigration Judge found that the respondent had failed to establish the extreme hardship requirement necessary for suspension of deportation. He also denied the respondent's request for voluntary departure in the exercise of discretion, based on his finding that the respondent's testimony was not credible.

On appeal, the respondent argues that he has demonstrated statutory eligibility for both suspension of deportation and voluntary departure relief. He also argues that he has demonstrated sufficient equities to warrant such relief as a matter of discretion. We agree with the Immigration Judge's finding that the respondent did not produce sufficient evidence to support a finding of extreme hardship. We do, however, find the respondent statutorily eligible for voluntary departure, and we will grant him such relief as a matter of discretion.

In order to establish eligibility for section 244(a)(1) suspension relief, an alien must prove that he has been physically present in the United States for the 7 years immediately preceding his application, that he has been a person of good moral character for the same period, and that his deportation will result in extreme hardship to himself or to his United States citizen or permanent resident spouse, child, or parent. The respondent bears the evidentiary burden of establishing statutory eligibility for suspension of deportation as well as showing that he warrants a favorable exercise of discretion. *See* section 244(a)(1) of the Act, 8 U.S.C. § 1254(a)(1).

Upon our review of the record we find that the Immigration Judge's decision to deny the respondent's request for suspension of deportation was proper and correct. Although we affirm the Immigration Judge's ultimate determination that the respondent had failed to demonstrate extreme hardship to himself or to a qualifying relative, we differ somewhat in our interpretation of the relevant factors that may be considered in a suspension case. Specifically, the Immigration Judge refused to consider any evidence regarding the political climate in Nigeria when making his determination regarding extreme hardship. We conclude that the Immigration Judge should have considered this evidence.

It is well settled that the conditions in an alien's homeland, including the political situation, are relevant in determining hardship. *See, e.g., Matter of Anderson,* 16 I&N Dec. 596 (BIA 1978). However, in this case, the Immigration Judge correctly noted that the respondent presented limited testimony regarding the political situation in Nigeria. The comments that were made by the

respondent, at the deportation hearing, went to the general country conditions in Nigeria. The testimony was not detailed, supported with evidence, nor geared directly to the respondent. Therefore, although considering the testimony regarding the political climate in Nigeria, we find that it is of little benefit to the respondent in his effort to demonstrate extreme hardship.

The record reflects that the respondent is married to a United States citizen, however, there is a divorce pending and the couple has been living apart for approximately 4 years (Tr. at 28, 40, 50). The respondent has been living with his ex-wife and three of his four children for the last 4 years, while his current wife has been living with her new boyfriend and the respondent's fourth child, the respondent's only child born to his current wife (Tr. at 19-20). The record also reflects that respondent's ex-wife is a Nigerian citizen currently in the United States on an F-2 visa. The record further reflects that if the respondent is deported, that his ex-wife, whom he has been living with for the past 4 years, and at least three of his children would most likely accompany him back to Nigeria (Tr. at 42-43, 48).

The Immigration Judge noted that the respondent is in good health and has had no problem finding employment in the United States. He further noted that the respondent presented no evidence regarding job opportunities in Nigeria. Although the Immigration Judge found that deportation would cause hardship to the respondent and his family, he found that the hardship was not extreme. We agree that the record fails to establish extreme hardship to the respondent or to a qualifying relative within the meaning of the Act. *See INS v. Wang,*

450 U.S. 139 (1981); *Hernandez-Cordero v. INS*, 819 F.2d 558 (5th Cir. 1987); *Sanchez v. INS*, 755 F.2d 1158 (5th Cir. 1985). We reemphasize that it is the respondent who bears the evidentiary burden of establishing statutory eligibility for suspension of deportation. *See* section 241(a)(1) of the Act, 8 U.S.C. § 1254(a)(1); *see also INS v. Wang, supra*. Accordingly, the respondent's appeal from the denial of suspension of deportation will be dismissed.

Turning now to the respondent's request for voluntary departure, we find that the respondent has demonstrated statutory eligibility for such relief and merits a favorable exercise of discretion. As such, we will reverse that part of the Immigration Judge's decision denying the respondent voluntary departure. Section 244(e) of the Act provides that the Attorney General may, in her discretion, permit an alien under deportation proceedings, other than those in certain specified categories, to depart voluntarily from the United States if he can establish that he has been a person of good moral character for at least 5 years immediately preceding his application. We note that Congress has not decreed that voluntary departure must be permitted for all who have satisfied the statutory prerequisites, but rather it has authorized the Attorney General to exercise her discretion. The ultimate grant of relief will depend on the facts of each case.

In the instant case, we note that the Immigration Judge found the respondent statutorily eligible for voluntary departure, but refused to grant this minimal relief in the exercise of discretion. Specifically, the Immigration Judge denied the voluntary departure relief based on his finding that the respondent's testimony was "less than credible." As support for his finding, the Immigration

Judge stated only the following: "[i]t appears, and it was corroborated by his U.S. citizen wife, that the testimony he gave in some areas was correct but in other areas there are some rather large questions. For example, he stated his U.S. citizen wife went by his name which is Osaren. Under oath the U.S. citizen wife stated that she used her maiden name, Comier."

After reviewing the record, we disagree with the Immigration Judge's credibility finding. To the contrary, we find that the respondent's testimony was fairly consistent, and for the most part, corroborated by the testimony of his United States citizen wife. Given the overall truthfulness and consistency of the respondent's testimony, we do not find the one inconsistency cited by the Immigration Judge, regarding which name the respondent's wife used, to be that significant. We agree with the Immigration Judge that the respondent is statutorily eligible for voluntary departure. We further find, however, no evidence which would preclude a grant of such relief as a matter of discretion. Accordingly, voluntary departure is granted.

In sum, we will dismiss that portion of the respondent's appeal which addresses the Immigration Judge's denial of his suspension application, but we will sustain that section appealing the denial of his voluntary departure request.

ORDER: The respondent's appeal of the Immigration Judge's denial of his suspension of deportation application is dismissed.

FURTHER ORDER: The respondent's appeal of the Immigration Judge's denial of his voluntary departure

request is sustained, and the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; in the event of failure so to depart, the respondent shall be deported as provided in the Immigration Judge's order.

/s/ Mary Maguire Dunne
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
New Orleans, Louisiana

File No.: A 29 398 450 June 8, 1995

In the Matter of JOE OMORODION OSAREN Respondent	)	IN DEPORTATION PROCEEDINGS

CHARGE: Section 241(a)(1)(B) and 241(a)(1)(C)(i).

APPLICATIONS: 244(a)(1) and 244(e).

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
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ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 41-year-old male, a native and citizen of Nigeria who entered the United States at or near New York, New York, at or about December 26, 1984, as an F-1 student. On January 12, 1994, an Order to Show Cause was issued. The respondent was deportable pursuant to Section 241(a)(1)(B) and Section 241(a)(1)(C)(i) for failing to comply with conditions of his nonimmigrant status in which he was admitted.

Respondent admitted the factual allegations in the Order to Show Cause and conceded deportability. He declined to designate a country for deportation and the

Immigration Judge at that time designated Nigeria if deportation became necessary.

Based on respondent's admissions, deportability has been established by clear, convincing and unequivocal evidence. The respondent has filed an application for relief from deportation pursuant to Section 244(a)(1) and voluntary departure pursuant to Section 244(e) of the Immigration and Nationality Act.

To qualify for suspension of deportation, an alien must establish that he is deportable under any law of the United States except paragraphs (2), (3), or (4) of Section 244(a); that he has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of the application (brief, innocent and casual trips abroad do not break the residency requirement); he is a person of good moral character and that the deportation would result in extreme hardship to himself, to the spouse, parent or child who is a U.S. citizen or lawful permanent resident alien.

The testimony and documentary evidence of record clearly establishes that the respondent is not deportable under paragraphs (2), (3) or (4) of Section 241(a) of the Act and he has met the statutory requirement for seven years of continuous physical presence preceding the date of his application for relief. Moreover, the Government has stipulated to the seven years residency requirements in the United States.

The respondent's case thus focuses on whether or not deportation would result in extreme hardship to himself, she [sic] be ordered deported and on the question of good moral character.

There is much testimony of who and when and where respondent is married to. It appears in this case that the respondent was married to a woman in Nigeria prior to coming to the United States and then he had children or a child by her. Then the testimony shows that he came to the United States and he started living with a U.S. citizen here for a period of years from 1984 to 1981 [sic].

The testimony reflects that during that time he also brought his wife from Nigeria here on an F-2 student visa. It appears from the record and the testimony of both the U.S. citizen wife of to date and from the respondent's testimony that it appears he must have been living with both woman [sic] part of this time.

During this period of time he has father [sic] U.S. citizen children by both the U.S. citizen wife and by the Nigerian wife; two by the Nigerian wife and one by the U.S. citizen while he was here in the United States.

The record reflects that the respondent's wife, the U.S. citizen, sought to file an I-130 for him in 1990 and was turned down because of a divorce in Nigeria. The Immigration Service did not think the divorce in Nigeria was an actual divorce.

Let the record reflect that there is a divorce now pending. The record does reflect that after that period in time the respondent did obtain a U.S. divorce from the Nigerian wife who was still in the United States. This Court is wondering was there proper service on the wife and was there a proper divorce. Nothing was entered into the record as to the proper divorce from the Nigerian wife. There is no evidence of such in the file.

Since that time it appears that the respondent married the U.S. citizen wife who has presently filed for divorce in 1992 and she stated today in testimony that the divorce is still filed of record but has not been completed.

The record also shows that the respondent started working shortly after he entered the United States. There is no documentation that he had authorization to work for the Immigration Service and it appears that he has continued ignoring the Immigration laws as to work authorization.

The record also reflects that the respondent over the past few years was arrested five times for various offenses, yet has not been convicted of one of the offenses.

The record reflects that his present wife, who he states he is not living with, the U.S. citizen wife has been living the last two years with another man. The record did reflect that both the respondent and his wife testified that the respondent did in some way help the U.S. citizen wife and children with occasional gifts of money and buying clothes and taking care of the children.

The record also reflected it appears that the respondent has an interest in the U.S. citizen child by Charlotte's former marriage and that he cares for and has been a sort of father role for this child. It appears that the respondent in this case has the father role for all kind of children in all kind of status whether they be U.S. citizens or Nigerian citizens and from one wife or another. The record also reflects that there is another child also involved here, a 14-year-old child, who appears to be the

daughter of his Nigerian wife who is also here as an illegal alien.

The respondent testified that he came to the United States as a student. The respondent testified that his health is good and that he has been employed in the United States practically since the moment he's been here. The record also reflects that these [sic] is no indication that there is a visa immediately available to the respondent or that there is any immediate means for which the respondent can obtain a visa to immigrate from the United States.

The U.S. citizen wife testified that the respondent seemed to be a good person to her and he was helpful, she grew up a lot and he helped her with a drinking problem that she's had, has cared for her and he is dear to her. She thought he did the best that he could.

There is no documentation as to the extent of property that the respondent owns in the United States and there is no evidence that there would be any financial hardship because of the ownership of property in the United States.

The respondent testified only limitedly that it would be a hardship to him to move back to Nigeria. In fact, the respondent testified that if he had to go back to Nigeria, he didn't know which children he would take back with him but he might take back several of the children. The respondent further testified that he didn't know if his Nigerian wife would go back to Nigeria or not.

There was no testimony as to job opportunities in Nigeria. The respondent did testify that he thought

because of the regime – the military regime at this time that he might be unwelcome back. Let the record reflect at this time there is no asylum claim filed on the part of the respondent.

I observed the demeanor of the respondent and I have heard his testimony and I find that his testimony is less than credible. It appears, and it was corroborated by his U.S. citizen wife, that the testimony he gave in some areas was correct but in other areas there are some rather large questions. For example, he stated his U.S. citizen wife went by his name which is Osaren. Under oath the U.S. citizen wife stated that she used her maiden name, Comier.

This Court finds that deportability from the United States, especially after a period of residency, is a hardship but hardship is not the standard by which to evaluate a suspension case. The standard is extreme hardship and it is construed narrowly. The matters which must be considered need to be no more refined than is necessary to meet such a narrow construction of the statutory language.

These factors include the length of residence in the United States, community ties in the United States, possibility of obtaining a visa, and the financial burden of the alien having to go abroad to obtain a visa if possible, and health and age of the alien.

Extreme hardship means at least hardship substantially differs from and is more severe than suffered by the ordinary alien who is deported. All the hardship factors must be considered cumulative as well as in isolation. In this case, the Judge has reviewed all the facts that were given before him, both those favorable and unfavorable

to the alien and his family. Brought together cumulatively, this Judge does not find that it meets the test of extreme hardship.

In the case at bar, the Court will consider the respondent's statement there would be extreme hardship for him because there are less economic opportunities for him in Nigeria and that his family would suffer because he went back to Nigeria. The respondent also testified that he thought several members of his family would go back with him. He also thought it was possible that the woman he is living with, which is his first wife, the Nigerian wife, might go back, too.

He stated that he had not talked to his former Nigerian wife about leaving her and going and living with the U.S. citizen wife. The U.S. citizen wife testified that she and he had talked about recreating their arrangement for the last six months but, in fact, the divorce decree was still filed.

The respondent does have family in the United States and it is a very complicated family. It isn't clear how much support he gives to what members of the family but it is accepted by the Court that he is in some form or fashion helping the various members of his family; his children, her children, their children, her former children, his former children.

Respondent testified he's in good health. There is no indication that if he were to get sick that there wouldn't be adequate health care for him in Nigeria. Respondent has not established that there would be diminished educational opportunities for him in Nigeria.

The respondent has been in the United States nearly 14 years. During this period of time he has gotten accustomed to the lifestyle of the United States. There is no testimony on his part that he belonged to any social or civic organization, though, or helped and did community effort. He did make a statement that he taught some in his church.

There is no evidence that the severance from any friendships would cause an extreme hardship to the respondent. There has been no list of friends who would indicate they would suffer by the respondent leaving the United States. There has been no evidence whatsoever to indicate the respondent would suffer emotional impact if he returned to Nigeria, although there may be a culture shock if he went back to Nigeria after being away from there for a period of time. The very fact was he did come to the United States when he was an adult would indicate to the Court that he was a mature person when he left Nigeria. Thus, the culture shock factor would be minimal. There is no evidence whatsoever to indicate the respondent would be forced to liquidate any of his assets in the United States which would be a devastating blow to his economic situation.

The Court is aware that his possibility of immigrating to the United States is very limited because of the marital situation at this time. There is a possibility in the future that his U.S. citizen wife could go back to Nigeria with him, marry him and after a period of time convince the U.S. Government that it is a viable marriage and petition for her husband.

The respondent indicated the political situation in Nigeria is of the type which would not be conducive to his well-being if he returned. He testified there were military coups in Nigeria, the government being overthrown, and there are people there suffering from the political situation. He testified the situation is not particular to him even though there was only limited testimony.

One appellate court has endorsed the BIA's views that political claims can be presented only through an application for asylum and withholding of deportation cannot be considered as an aspect of extreme hardship for the purposes of suspension of deportation. The availability of an application for asylum or withholding now voids the need for consideration of whether the hardship aspects of the suspension of deportation is satisfied by the threat of persecution.

The respondent has established he is statutorily eligible for voluntary departure. From his testimony the respondent sought to establish that he is statutorily eligible but in it [sic] still in the Court's discretion whether to grant such relief. The Court has found the testimony of the respondent less than credible which goes to the question of good moral character.

When taken into consideration all of the above factors, separately and cumulatively, this Court finds that the respondent has failed to establish extreme hardship should he be deported to Nigeria.

ORDER

IT IS HEREBY ORDERED that the application for suspension of deportation pursuant to Section 244(a)(1) of the Immigration and Nationality Act is hereby denied.

IT IS FURTHER ORDERED that the application for voluntary departure pursuant to Section 244(e) of the Immigration and Nationality Act is hereby denied.

IT IS FURTHER ORDERED that the respondent in this case should be deported to Nigeria.

/s/ M. Edwin Prud'Homme
M. EDWIN PRUD'HOMME,
Immigration Judge

Supreme Court, U.S.
FILED
JUL 2 1997
OFFICE OF THE CLERK

No. 96-1653

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOE OMORODION OSAREN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether the court of appeals erred in declining to order the Board of Immigration Appeals to change the time allowed for petitioner to depart voluntarily from the United States in lieu of deportation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unpublished, but the decision is noted at 105 F.3d 656 (Table). The opinions of the Board of Immigration Appeals (Pet. App. 6-12) and the immigration judge (Pet. App. 13-22) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 24, 1996. A petition for rehearing was denied on February 25, 1997. Pet. App. 3-4. The petition for a writ of certiorari was filed on April 17, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a native and citizen of Nigeria, entered the United States as a student in December 1984. Pet. App. 7, 13. In January 1994, the Immigration and Naturalization Service (INS) initiated deportation proceedings against petitioner under former Sections 241(a)(1)(B) and 241(a)(1)(C)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(1)(B) and 1251(a)(1)(C)(i) (1994), on the ground that he had stayed in the country beyond the period authorized and had otherwise violated the conditions of his entry visa. Pet. App. 6-7, 13.

Petitioner admitted the truth of the INS's factual allegations and conceded deportability, but he requested discretionary relief in the form of suspension of deportation under former Section 244(a) of the INA, 8 U.S.C. 1254(a) (1994), or, in the alternative, the opportunity to depart the United States voluntarily, under former Section 244(e)(1), 8 U.S.C. 1254(e)(1) (1994), rather than be deported. Pet. App. 13-14. In June 1995, after an evidentiary hearing, an immigration judge (IJ) found that petitioner had failed to establish that his deportation would give rise to the "extreme hardship" required to make him statutorily eligible for suspension of deportation. *Id.* at 14, 21; see 8 U.S.C. 1254(a)(1) (1994). The IJ also denied petitioner's request for voluntary departure. Pet. App. 21-22.

The Board of Immigration Appeals (BIA) upheld the IJ's decision that petitioner had not demonstrated eligibility for suspension of deportation. Pet. App. 6-12. While it recognized (as had the IJ) that deportation would of course cause some hardship, the Board "agree[d] that the record fail[ed] to establish extreme

hardship to [petitioner] or to a qualifying relative within the meaning of the [INA]." *Id.* at 9. The Board also agreed with the IJ that petitioner was statutorily eligible for voluntary departure; and, unlike the IJ, the Board found "no evidence which would preclude a grant of such relief as a matter of discretion." *Id.* at 11. The Board therefore sustained petitioner's appeal on that point, and ordered that petitioner be "permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director." *Id.* at 12. If petitioner failed to depart voluntarily within the time allowed, he was to be deported. *Ibid.*

Petitioner sought review of the Board's decision in the court of appeals, under the provision for such review contained at that time in Section 106(a) of the INA, 8 U.S.C. 1105a(a) (1994). In a brief per curiam opinion (Pet. App. 1-2), the court affirmed the Board's disposition of the case, observing (*id.* at 2) that petitioner "received a full and fair opportunity to develop his claim of 'extreme hardship' before the Attorney General's delegate." With respect to voluntary departure, the court simply stated (*ibid.*) that petitioner's "request that we order the BIA to change his voluntary departure date is DENIED," citing *Faddoul* v. *INS*, 37 F.3d 185 (5th Cir. 1994).

ARGUMENT

1. At the time petitioner was found to be deportable, Section 244(e) of the Immigration and Nationality Act, 8 U.S.C. 1254(e) (1994), permitted the Attorney General, in her discretion, to allow any deportable alien who met certain basic qualifications to depart voluntarily from the United States in lieu of

deportation. The Attorney General delegated that authority to immigration judges and the Board of Immigration Appeals in the first instance, and she committed decisions to reinstate or extend the time for voluntary departure in most cases to the "sole jurisdiction" of the INS's various district directors. 8 C.F.R. 244.1-244.2 (1997), revised and renumbered as 8 C.F.R. 240.56-240.57 (62 Fed. Reg. 10,377 (Mar. 6, 1997)). As petitioner observes (Pet. 9), one principal advantage of voluntary departure, from the point of view of a deportable alien, was that it avoided application of the five-year bar imposed by former Section 212(a)(6)(B) of the INA, 8 U.S.C. 1182(a)(6)(B) (1994), on reentry by deported aliens without the specific consent of the Attorney General.

2. Petitioner argues (Pet. i, 5-10) that an alien should not be forced to choose between seeking judicial review of an order of deportation and taking advantage of a grant of voluntary departure that may expire before review has been completed. Even if petitioner had been put to that choice, his claim would be insubstantial. An alien who has been found to be deportable has no right to voluntary departure, and a choice between taking advantage of that discretionary benefit (on the terms on which it is offered) and pursuing additional legal process as of right (at the end of which the government might prove less accommodating) is little different from the choice that routinely faces criminal defendants in deciding whether to enter into a plea agreement with the government. See *Castaneda* v. *INS*, 23 F.3d 1576, 1581-1582, on denial of reh'g, 33 F.3d 44 (10th Cir. 1994); compare *Brady* v. *United States*, 397 U.S. 742, 749-753 (1970). Congress has committed the decision whether, and on what conditions, to grant voluntary

departure to an eligible alien to the discretion of the Attorney General, and a reviewing court has no authority to extend or reinstate a voluntary departure order that has expired by its terms. See *Castaneda*, 23 F.3d at 1583.

In fact, petitioner was not put to the choice that he posits. As petitioner points out (Pet. 7, 10-11), the Fifth Circuit has asserted the right to review a decision by the BIA not to grant an alien's request, in deportation proceedings, to specify a voluntary departure period that would expire within a specified time after the resolution of any appeal. *Faddoul* v. *INS*, 37 F.3d 185, 191-193 (1994). Petitioner represents (Pet. 4, 11) that he made such a request to the BIA, which instead granted his request for voluntary departure, but only for a period "within 30 days from the date of this order or any extension beyond that time as may be granted by the district director" (Pet. App. 12). Petitioner sought review of that decision in the court of appeals, which specifically refused to alter the departure date specified by the BIA. *Id.* at 2. In those circumstances, the proper inference is not, as petitioner contends (Pet. 10-11), that the court of appeals "[d]eclined [t]o [r]eview" the Board's decision, but that it found no reason to extend the voluntary departure period granted by the Board.

Finally, we note that petitioner does not allege that he has requested reinstatement or extension of the time for his voluntary departure from the INS district director, or that the district director has denied any such request. Having enjoyed a stay of deportation pending appeal, under former Section 106(a)(3) of the INA, 8 U.S.C. 1105a(a)(3) (1994), and having obtained a stay of the court of appeals' mandate pending the disposition of this petition (Pet. App. 5;

see Fed. R. App. P. 41(b)), petitioner has, to date, faced no immediate danger of deportation. While petitioner cannot, at this point, plausibly contend that he requires any substantial additional amount of time to wind up his affairs in the United States, there is no reason to assume that the appropriate INS district director would deny a timely request by petitioner for reinstatement of a brief period of voluntary departure.*

3. As petitioner points out (Pet. 5-9), the courts of appeals adopted different approaches to reviewing deportable aliens' requests for judicial orders reinstating or extending the time for voluntary departure accorded them under former Section 244(e) of the INA, 8 U.S.C. 1254(e) (1994). Some courts correctly held that they lacked jurisdiction to reinstate or extend an administrative grant of voluntary departure under that provision. See, *e.g.*, *Nkacoang* v. *INS*, 83 F.3d 353, 356-357 (11th Cir 1996); *Castaneda*, 23 F.3d at 1578-1583 (reviewing cases). Other courts asserted jurisdiction to reinstate or extend such a grant under varying circumstances. See, *e.g.*, *Faddoul*, *supra*; *Ramsay* v. *INS*, 14 F.3d 206, 211-213 (4th Cir. 1994) (while decision should "usually" be left to district director, court will extend where INS does not suggest any reason for district director to deny reinstatement apart from alien's decision to appeal);

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* That decision would, of course, rest solely in the discretion of the district director, and we make no representation that such a request would be granted. Our point is simply that petitioner offers no reason to believe that district directors routinely refuse to reinstate or extend the time for voluntary departure for otherwise eligible aliens simply because they have sought judicial review. See *Kaczmarczyk* v. *INS*, 933 F.2d 588, 598 (7th Cir.), cert. denied, 502 U.S. 981 (1991).

Contreras-Aragon v. *INS*, 852 F.2d 1088 (9th Cir. 1988) (en banc) (period for voluntary departure does not begin to run until issuance of court of appeals' mandate affirming BIA's order). In this case, as noted above, the court of appeals evidently did review the time limit imposed by the BIA for voluntary departure (see Pet. App. 2, citing *Faddoul*), and the divergence in approach that he identifies is therefore of limited relevance here. To the extent, however, that petitioner might have received even more favorable treatment in some other circuit, recent statutory changes have deprived the issue of any continuing importance.

On September 30, 1996, the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. Section 309(c)(4)(E) of IIRIRA, 110 Stat. 3009-626, provides that, in judicial review of any final order of deportation entered on or after October 31, 1996, "there shall be no appeal of any discretionary decision under section * * * 244" of the INA (as in effect on the date of IIRIRA's enactment). Because former Section 244(e) conferred the authority for grants of voluntary departure, IIRIRA settles, prospectively, any dispute about a court of appeals' authority to review or alter the BIA's exercise of the Attorney General's discretion in that regard.

In addition, Section 308(b)(7) of IIRIRA, 110 Stat. 3009-615, repeals former Section 244 in its entirety, as part of a general revision of the provisions relating to deportation (now referred to as "removal"). Former Section 244(e) has been replaced with a new Section 240B of the INA, to be codified at 8 U.S.C. 1229c, providing for the discretionary grant of volun-

tary departure under certain circumstances. See IIRIRA § 304(a)(3), 110 Stat. 3009-596. New Section 240B(f), to be codified at 8 U.S.C. 1229c(f), specifies that "[n]o court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure" entered at the conclusion of removal proceedings; and new Section 242(a)(2)(B), to be codified at 8 U.S.C. 1252(a)(2)(B), reiterates that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review * * * any judgment regarding the granting of relief under section * * * 240B." See IIRIRA § 306(a)(2), 110 Stat. 3009-607.

Neither IIRIRA's preclusion of judicial review of decisions under old Section 244(e) nor its new provisions concerning voluntary departure apply to petitioner's case, because the administrative deportation proceedings against petitioner were commenced and concluded before October 31, 1996. See IIRIRA § 309(a) and (c), 110 Stat. 3009-625. In light of the statutory changes and jurisdictional clarifications enacted by IIRIRA, however, the issue that petitioner seeks to raise in this case is of no continuing importance and does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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